Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, THE ALLIANCE FOR COMMUNITY MEDIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY

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SUMMARY

Like our opening comments, the majority of opening comments supported the local franchising process as it is, and opposed any preemptory FCC rules concerning § 621(a)(1) of the Cable Act. The telephone industry and its allied commenters took a dramatically different view, urging the Commission to use § 621(a)(1) as a springboard for rewriting the Cable Act by adopting a series of rules that would preempt the ability of LFAs to perform the responsibilities that the Cable Act preserves to them. Telephone industry commenters fail, however, to provide any convincing factual predicate for the unprecedented actions they propose. Industry resorts to anonymous anecdotes and recirculated second and third-hand press accounts. Given the anonymous nature and limited number of anecdotes relative to the number of LFAs nationwide, however, the record indicates a decided *lack* of any widespread problem justifying any FCC action.

The Commission cannot rewrite Congress' language to suit the telephone industry's, or even the Commission's, policy preferences. Not a single telephone industry commenter addressed the inextricable link between §§ 635(a) and 621(a)(1) contained in the 1992 amendments that assigns of review of § 621(a)(1) disputes to the courts, not the FCC. The FCC cannot assert its ancillary jurisdiction in a manner that would conflict with specific provisions in its governing statute -- in particular, §§ 621(a)(1) and 635(a). Section 706 of the 1996 Act cannot plausibly be read as empowering the FCC to amend or repeal any provision of Title VI, and the Commission has already ruled that § 706 is not an independent source of Commission authority. Similarly § 4(i) only authorizes FCC action that is "not inconsistent with this Act," and assertion of authority over § 621(a)(1) would be inconsistent with the Act -- specifically § 635(a).

Verizon's First Amendment argument is a facial challenge to the Cable Act itself, a challenge that the Commission is powerless to entertain. The reasonableness of the kinds of franchise requirements attacked by Verizon must be evaluated as they are applied in specific factual contexts. These factual contexts will vary from LFA to LFA.

Even if one were to assume that the FCC has authority to adopt rules concerning § 621(a)(1) (which it does not), the series of preemptive rules proposed by the telephone industry and its allies, are in most cases flatly inconsistent with the Cable Act.

Virtually all proponents of § 621(a)(1) rules urge the Commission to set time limits on LFA franchising decisions. These deadline proposals cannot be squared with the Cable Act and would improperly transform the FCC into a national franchising authority. The initial franchising process is quite different from the franchise transfer process, and contrary to some ILECs' assertions, those differences mean that the initial franchising process will, and should, inherently be longer (or at least more variable) than the franchise transfer process. The terms of the new entrant's franchise cannot be the ones that the applicant unilaterally proposes, because that would allow the applicant to dictate unilaterally its own franchise terms, directly contrary to the Cable Act's requirement that cable franchises must be responsive to local needs and interests as determined by the LFA. Nor could the FCC dictate the terms of the applicant's new franchise without effectively becoming the LFA, in direct contravention of the Cable Act. Section 621(a)(1) clearly allows a *reasonable* refusal, but under the ILECs' deadline proposals, there would be none: Once the deadline passes, the LFA could not "refuse" at all, no matter how unreasonable the applicant's proposal in light of community needs, or how unreasonable or recalcitrant the applicant has been in negotiations with the LFA.

ILECs and their allies urge the Commission to adopt rules prohibiting LFAs from imposing buildout requirements on competitive franchise applicants. But they mischaracterize the nature of franchise buildout requirements, which contain density limitations and also provide a reasonable time for system buildout. Telephone industry commenters and their allies also cannot escape the plain language of § 621(a)(4)(A). That provision certainly cannot be read to mean that even if an LFA gives a provider a "reasonable period to time" to do so, the LFA can nevertheless be *forbidden* from requiring an operator to "provid[e] cable service to *all* households in the franchise area." Yet that is precisely what Verizon and its allies improperly urge the Commission to do. Nor can a provider define its own franchise area." If a provider could self-define its franchise area, that would undermine the entire local franchising process envisioned by the Cable Act.

Telephone industry commenters' launch a range of misguided and unwarranted attacks on cable franchise fee, PEG access, and I-Net requirements. Proponents of franchise fee rules, however, have not shown any widespread LFA abuse, nor any problem that courts are not perfectly capable of handling.

Some telephone industry commenters urge the FCC to declare that PEG in-kind and monetary grant obligations over and above the 5% franchise fees are not permissible. But the Commission cannot do that, for any such ruling would be contrary to the Cable Act. In-kind facilities or services are not a "tax, fee, or assessment of any kind" within the meaning of § 622(g)(1). With respect to monetary payments to support PEG, Section 622(g)(2)(C) specifically exempts from the "franchise fee" definition "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."

Telephone industry commenters' attacks on I-Net obligations are misguided. The claim that I-Nets are somehow limited to video service flies in the face of the statute, which defines I-Nets to encompass non-video services, such as data transmission and telecommunications. I-Nets are used by LFAs for a variety of non-video applications, such as data and voice communications, and those I-Nets perform vital public safety and homeland security communications functions. That is a capability that LFAs and, indeed, local residents and our nation, cannot afford to lose in these dangerous times.

Some RBOCs urge the Commission to adopt rules prohibiting an LFA's ability to assess a franchise application fee, acceptance fee, and LFA application processing cost reimbursement requirements over and above the 5% franchise fee. But § 622(g)(2)(D) refers to "requirements or charges *incidental to the awarding or enforcing* of the franchise," not to requirements or charges *"incidental" in amount*. Obtaining a mortgage, for instance, is typically "incidental to" buying a house, but the mortgage is not necessarily (or even usually) "incidental" in amount. The other "charges or requirements" listed as examples in § 622(g)(2)(D) -- "bonds, security bonds, letters of credit, insurance, indemnification, penalties, or liquidated damages" -- cannot plausibly be construed to be invariably incidental in amount. The amount of application fees and cost reimbursement depends on a variety of factors, not the least of which is how cooperative, or recalcitrant, the applicant is in the franchise application and negotiation process.

The RBOCs argue that their upgraded broadband systems are not "cable systems" within the meaning of § 602(7). But to the extent that a common carrier facility is used to provide cable services, it is *both* a cable system *and* a common carrier facility, and the "cable system" component of the facility includes the facility's "set of closed transmission paths" -- *i.e.,* its physical wires and cable. This does not result in the supposed problems or "barriers" about which the RBOCs complain. There is no credible evidence that LFAs are in any way hampering RBOC network upgrades by demanding a cable franchise before any network upgrade activity can commence.

Telephone industry commenters and their allies urge the Commission to preempt so-called “level playing field” requirements. Because only courts, not the FCC, can construe and enforce § 621(a)(1)’s “unreasonable refusal” requirement, § 621(a)(1) furnishes the Commission with no authority to preempt state level playing field laws. Moreover, there is little or no evidence to suggest that state level playing field laws have had any adverse effect on the granting of competitive franchises. Further, to the extent that opponents of level playing field requirements mean to suggest that the FCC can or should untether the terms of competitive franchises from those of the incumbent’s cable franchise, they are wrong. A competitor’s franchise should be comparable to the incumbent’s in terms of meeting local cable-related needs and interests such as PEG capacity and support, I-Nets and similar requirements. The touchstone of the Cable Act is that a cable system must be responsive to *local* community cable-related needs and interests, *not* cookie-cutter, federally-determined needs and interests. While that does not mean that a competitive franchise must or should be identical to the incumbent’s, it does mean that the competitive franchise should be comparable to the incumbent’s in terms of its responsiveness to local cable-related needs and interests.

Congress gave § 621(a)(1) disputes to the courts rather than the FCC for a very good reason: Such disputes are inherently fact-specific, and thus are ones that the courts are particularly well-suited to handle, and that the FCC is particularly ill-equipped to handle.

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The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League Of Cities ("NLC"), the National Association of Counties ("NACO"), the U.S. Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance For Communications Democracy ("ACD"), submit these reply comments in response to opening comments filed to the Notice of Proposed Rulemaking, released November 18, 2005, in the above-captioned proceeding ("*NPRM*").

INTRODUCTION

Like our opening comments, the majority of opening comments supported the local franchising process as it is, and opposed any preemptory FCC rules concerning § 621(a)(1) of the Cable Act. Of nearly 4,000 opening comments, most, including the comments by local franchising authorities ("LFAs"), public, educational and governmental ("PEG") access organizations and users, and many members of the public, took that position. So did the cable industry.[1] And at least one competitive, or "overbuild," cable operator did as well.[2]

As expected, the telephone industry and its allied commenters took a dramatically different view. They urge the Commission to use § 621(a)(1) as a springboard for completely rewriting the Cable Act by adopting a series of onerous rules that would radically preempt the ability of LFAs to perform the responsibilities that the Cable Act preserves to them.[3]

Telephone industry proponents of these drastic rules, however, woefully fail to provide any convincing factual predicate for the unprecedented Commission actions they propose. Ignoring the *NPRM*'s explicit directive (at ¶ 13) that industry present "specific examples" and "empirical data" of supposed LFA abuse, industry instead resorts primarily to anonymous anecdotes and recirculated second and third-hand press accounts[4] -- anecdotes and accounts that are one-sided and subject to no corroboration and which therefore would inherently be a faulty basis from which any reliable conclusions could be drawn.[5] Indeed, given the anonymous nature and limited number of industry's anecdotes relative to the number of LFAs nationwide, the record indicates a decided *lack* of any widespread problem justifying any FCC action. Likewise, although industry searches far and wide in the Communications Act for a legal basis for the FCC rules they propose,[6] they seem completely unaware of § 635(a), which clearly and

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[1] *See, e.g.*, NCTA Comments at 2, 5, 11, 19; Cablevision Comments at 6-7; Comcast Comments at 2-3, 12, 26; Charter Comments at 4, 8, 12.
[2] RCN Comments at 2, 6, 8.
[3] *See generally* Verizon Comments; AT&T Comments; BellSouth Comments; Qwest Comments; USTA Comments; FTTH Council Comments; BSPA Comments; Cincinnati Bell Comments; Consumers for Cable Choice Comments.
[4] Verizon Comments at 32-35, 41, 54, 59-60, 62-66, 72-73, 75-76; AT&T Comments at 24-26, 52-53; BellSouth Comments at 36, 38, 41-42; Qwest Comments at 9, 13-14.
[5] To the limited extent that telephone industry commenters do actually identify particular LFAs, reply comments being filed on behalf of several groups of LFAs address many of these accounts and show them to be exaggerated, distorted, or simply wrong.
[6] *See* Verizon Comments at 21-27; AT&T Comments at 32-42; BellSouth Comments at 48-67; Qwest Comments at 14-20.

unambiguously answers the legal question: Authority over § 621(a)(1) lies with the courts, not the Commission.[7]

But aside from these and many other legal and factual infirmities in industry's position, telephone industry proposals for new § 621(a)(1) rules rest on a fundamentally flawed premise. To its credit, AT&T is at least candid about the matter, saying that the need for § 621(a)(1) rules "does *not* rest on evidence that many . . . LFAs have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future."[8] Rather, in AT&T's view, the radical new § 621(a)(1) rules it and its allies propose would be needed even if "each of the nation's thousands of LFAs could be expected to act as quickly and reasonably as state and local laws allow."[9]

In other words, the telephone industry's position is that, due to technological change, the FCC must construe § 621(a)(1) -- which forbids only "unreasonable" refusals to award an additional competitive franchise -- also to reach and preempt even "quick and reasonable" LFA decisions because, again according to AT&T, marketplace changes mean franchising decisions can no longer be "left in the hands of" LFAs.

But this the Commission cannot do. The Cable Act leaves these decisions "in the hands of" LFAs and, where disputes arise, to the courts.[10] The Commission cannot rewrite Congress' language to suit the telephone industry's, or even the Commission's, policy preferences.[11] While

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[7] NATOA *et al.* Comments at 4-20. *See also* NCTA Comments at 19-28.
[8] AT&T Comments at 2 (emphasis added).
[9] *Id.*
[10] *E.g.* NATOA *et al.* Comments at 4-20.
[11] *See NPRM*, Statement of Comm'r Jonathan S. Adelstein, at p. 25 ("The Commission needs to tread with caution and care before it asserts any authority to interpose itself with LFAs to the extent Congress specifically delegated power to local officials. … We should not and indeed cannot usurp for ourselves the authority granted by Congress to local governments. … Even if the Commission were to agree from a policy perspective that the franchising
. . . (continued)

we disagree with industry's policy preferences, resolution of disagreements over policy preferences such as these -- which really are what the telephone industry and its allies' massive filings are all about (although others are not so forthright about it as AT&T) -- are for Congress, not the Commission. Section 621(a)(1) simply cannot be read to empower the Commission to adopt rules preempting and supplanting the LFA franchising process, regardless of how "quick and reasonable" an LFA may be, to achieve some preferred policy objective.

Stripped of this misdirected policy preference rhetoric, industry's arguments for preemptive § 621(a)(1) action wither, as we now show.

I. NO PARTY IS ABLE TO DISPUTE WHAT § 635(a) PLAINLY SAYS: CONGRESS GAVE THE COURTS, NOT THE FCC, JURISDICTION OVER § 621(a)(1) DISPUTES.

Several commenters agreed with the position in our comments that the prospect of the FCC adopting rules to implement or enforce § 621(a)(1) exceeds the Commission's legal authority under the Communications Act.[12] Telephone industry commenters, in contrast, advanced little or no legal justification for the position that the FCC has legal authority to assert § 621(a)(1) jurisdiction. Moreover, not a single telephone industry commenter addressed the

(Continued). . .
process is cumbersome and unwieldy, as competitors argue passionately, those arguments are better made before Congress, not the Commission. The franchising process and local powers are spelled out clearly in statute, and only Congress can provide such relief.").

[12] *See, e.g.*, NCTA Comments at 19-29; Comcast Comments at 26-39; Cablevision Comments at 5-8; VCTA Comments at 6-8; Comments of Michigan Municipal League, Michigan Townships Association, Michigan Coalition to Protect Public Rights-Of-Way and Michigan-National Association of Telecommunications Officers and Advisors ("Michigan Coalition") at 3-28; Comments of Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County ("Maryland Counties") at 30-38; Initial Comments of the Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission at 27-38; Comments of Ada Township, Allendale Charter Township, City of Cadillac, Holland Township, City of Hudsonville, Huron Charter Township, City of Livonia, Milton Township, City of Southfield, City of Swartz Creek, Vienna Charter Township, City of Warren, City of Westland, Whitewater Township, Zeeland Township and the Pennsylvania State Association of Boroughs ("Pennsylvania and Michigan Municipalities") at 4-7.

inextricable link between §§ 635(a) and 621(a)(1) contained in the 1992 amendments and Congress' explicit assignment of review of § 621(a)(1) disputes to the courts, not the FCC.

A. The Authorities Cited by the Telephone Industry Commenters Do Not Support Their Claim that the FCC Can Rely on its Plenary Rulemaking Authority to Implement Provisions of § 621(a)(1).

Verizon, AT&T, BellSouth and the USTA assert that *AT&T Corp. v. Iowa Utils. Bd*., 525 U.S. 366 (1999), and *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), support the *NPRM's* tentative conclusion that the Commission has legal authority to adopt rules to interpret, implement and enforce § 621(a)(1). We disagree.

As an initial matter, the telephone industry comments fail to read *Iowa Utils. Bd*. properly.[13] In fact, when properly read, *Iowa Utils. Bd*. further bolsters our position, not the telephone industry's. The issue in that Title II case was whether the authority given to the FCC by § 201(b)[14] extended with equal force to the Title II amendments to the Communications Act made by the Telecommunications Act of 1996. The answer turned on the "question [of] whether the state commissions' participation in the administration of the new [post-1996 Act] *federal* regime [for carrying out the provisions of §§ 251 and 252 was] to be guided by federal-agency regulations." *Iowa Utils. Bd*., 525 U.S. at 378 n.6 (emphasis in original). FCC jurisdiction over the underlying Title II provisions (§§ 251 and 252) in dispute in *Iowa Utils. Bd*. is perfectly consistent with our views on FCC jurisdiction in this proceeding. The Court held, *inter alia,* that the FCC's ancillary jurisdiction "*could* exist" even where the Act does not expressly authorize the FCC to assert its jurisdiction. *Iowa Utils. Bd*., 525 U.S. at 380. It is this holding

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[13] *See, e.g.,* Verizon Comments at 22, 25; AT&T Comments at 34; BellSouth Comments at 56; USTA Comments, at 16 n.39.

[14] Section 201(b) provides that "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b).

that telephone industry commenters wish to characterize as applicable in the instant proceeding. In doing so, however, they sidestep the real issue, because what we challenge is not the existence of the Commission's ancillary jurisdiction, but the *NPRM*'s suggestion that the FCC might attempt to assert its ancillary jurisdiction in a manner that would conflict with specific provisions in its governing statute -- in particular, §§ 621(a)(1) and 635(a).

Iowa Utils. Bd. is instructive in this respect. In reaching its holding, the Court acknowledged the "need for both limitations" on statutory construction (referring to the need for limits on substantive reach of statute as well as on FCC's ancillary authority). *See Iowa Utils. Bd*., 525 U.S. at 380-81. It did this in the context of a case "involv[ing the FCC's] attempt to regulate services over which it *has* explicitly been given rulemaking authority." *Iowa Utils. Bd*., at 382 n.7 (emphasis in original). Cast in this light, the question that the *NPRM* should be asking is whether the proposed exercise of the FCC's ancillary authority over 621(a)(1) exceeds the authority granted to the FCC by the Act. In *Iowa Utils. Bd.*, the answer to that question with respect to the Title II provisions at issue was an unequivocal, "no." Here, in contrast, the answer with respect to the Title VI provisions at issue (§§ 621(a)(1) & 635(a)), is an equally unambiguous, "yes."

Iowa Utils. Bd. did not hold that the expansive reach of § 201(b) gave the FCC authority to adopt rules and regulations under Title VI, much less rules and regulations inconsistent with the Act itself. Accordingly, there simply is no basis whatsoever here -- either within the four corners of the Communications Act or the cases cited by the telephone industry commenters -- to conclude, as AT&T contends (at 34), that "the Commission's § 201(b) authority to issue regulations extends to *all* amendments to the Communications Act" (emphasis in original), when § 635(a) specifically says otherwise with respect to § 621(a)(1). The driving principle common to *Iowa Utils. Bd*. and this proceeding is about determining "whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Iowa Utils. Bd*., 525 U.S. at 378 n.6. In overlooking this distinction, the telephone industry commenters not only miss the analytical mark but, more importantly, threaten to disrupt the careful balance that Congress struck when in § 635(a) it expressly reserved authority over § 621(a)(1) to the courts.

Moreover, the *Iowa Utils. Bd.* Court's crisp delineation of ancillary jurisdiction does not stand alone. In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which involved a legal question very analogous to the one in this proceeding, the Court held that the FCC's ancillary jurisdiction does not reach into areas where the Act itself denies the FCC authority. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 281 n.7 (stating that *Louisiana Public Service Commission* "involved the Commission's attempt to regulate services over which it had not explicitly been given rulemaking authority"). The fallacy in the telephone industry commenters' arguments here is clear: They ignore that the 1992 Act amended § 635(a) to *include* § 621(a)(1) on the short list of three Cable Act provisions for which Congress explicitly assigned exclusive jurisdiction to the courts. This amendment to § 635(a) was simultaneous with, and integral to, the addition of the "unreasonable refusal" provision in § 621(a)(1) that is a principal focus of the *NPRM's* inquiry. *See* NATOA comments, at 5-7.

The telephone industry's comments also misconstrue *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).[15] We have already emphasized in our opening comments (at 16-17) the critical distinctions that render *Chicago* inapplicable to telephone industry commenters' sweeping proposition that the FCC has virtually unchecked general authority "to interpret Section 621's franchising requirements." *See* Verizon Comments at 22. Briefly restated,

[15] *See, e.g.*, Verizon Comments, at 22, 25; AT&T Comments, at 35; BellSouth Comments, at 53 n.100, 56; USTA Comments, at 13.

Chicago is most appropriately characterized not as a § 621 case, but as a case construing the definitions listed in § 602 of the Act. Perhaps more importantly, *Chicago* is at most a § 621*(b)(1)* case, not a § 621(a)(1) case. Indeed, § 635(a)'s explicit grant to courts of exclusive jurisdiction over § 621(a)(1) disputes was completely ignored by virtually every single telephone industry commenter.

Even if the sum of the telephone industry commenters' proposed § 621 rules reflected good policy (which they do not), neither industry's estimations, nor "the Commission's estimations, of desirable policy can[] alter the meaning of the federal Communications Act of 1934." *MCI Telecommunications Corp., v. AT&T Co.*, 512 U.S. 218, 234 (1994). What the *NPRM* suggests goes well beyond mere tinkering: "[i]t is effectively the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established." *MCI*, 512 U.S. at 234. Ultimately, what the telephone industry commenters and their allies seek to accomplish through this *NPRM* proceeding -- FCC adoption of § 621(a)(1) rules that would co-opt the fundamental role that Congress created for LFAs in the franchising process -- is simply not permitted by the Cable Act.

B. Section 706, A Non-Title VI Provision, Does Not Give the FCC Authority to Rewrite Title VI (The Cable Act).

Our opening comments submitted in this proceeding already demonstrate that § 706 of the 1996 Act cannot be read to empower the Commission to "take action" (*NPRM*, at ¶18) on concerns related to the franchising process. There is no indication whatsoever -- in § 706 or elsewhere -- that Congress intended to redraw the jurisdictional boundaries of Title VI and extend its delegation of authority for implementing § 621(a)(1) beyond LFAs and, where disputes arise, to the courts under § 635(a) . Consequently, § 706 does not grant the FCC the necessary authority to preempt local and state franchising requirements.

As noted in the cable industry's opening comments, the cable franchising issues addressed by the *NPRM* are unrelated to the stated purpose of § 706.[16] While broadband deployment may be "the top priority for this Commission,"[17] that does not mean that § 706 furnishes the FCC with a license to disregard the explicit and controlling provisions of the Cable Act.

Section 706 simply cannot plausibly be read as empowering the FCC to amend or repeal *any* provision of Title VI. And indeed, the Commission itself has already ruled that § 706 is *not* an independent source of Commission authority:

> For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, *the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority*.[18]

Moreover, the Communications Act does not authorize the FCC to make basic and fundamental changes in the underlying regulatory scheme enacted by Congress. *MCI Telecommunications Corp., v. AT&T Co.*, 512 U.S. 218 (holding that the FCC's power to "modify" the requirements of 47 U.S.C. § 203 does not authorize the FCC to drastically revamp

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[16] Even if § 706 were applicable in the instant proceeding (which it is not), there is no evidence that ILECs' broadband deployment has been hampered by the local franchising process. As Comcast points out (at 34-35), Verizon has already deployed its FiOS broadband service to more than 3 million homes and businesses across 16 states, expects to deploy to 6 million homes by January 2007and to 20 million homes by 2009. *See* Verizon, 4Q 2005 Earnings Release *available at* http://www.investor.verizon.com/news/view.aspx?NewsID=718; John Eggerton, *FiOS Expands in Texas*, Broad. & Cable (Jan. 5, 2006), *available at* http://www.broadcastingcable.com/article/CA6297189.html. The fact that ILECs are deploying their networks without obtaining franchises (by choice) undermines any suggestion that LFAs are impeding their entry.

[17] *Communications Daily*, Vol. 26, No. 53, at 3 (March 20, 2006) (quoting FCC Chairman Martin at his first news briefing).

[18] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Opin. & Order, 13 FCC Rcd. 24011, 24012 at ¶ 77 (1998) (emphasis added). *See also Order on Reconsideration*, 15 FCC Rcd. 17044 at ¶ 5 (2000) (affirming that the "the most logical statutory interpretation is that section 706(a) does not constitute an independent grant of authority") (internal citation omitted).

the Congressional blueprint for tariff filing by telecommunications carriers). Given Congress' explicit delegation to LFAs of jurisdiction over franchising decisions in § 621(a)(1), subject to court review under § 635(a), any attempt by the FCC to bootstrap the non-Title VI objectives of § 706 into Title VI would reach "beyond the meaning that the statute can bear," and its interpretation would not be entitled to deference. *MCI*, 512 U.S. at 229.

Finally, it is critical that the Commission recognize the absence of evidence indicating any Congressional intent to grant the FCC the authority either to preempt LFAs operating within the intended meaning of § 621(a)(1), or to seize a share of the explicit grant of jurisdiction over § 621(a)(1) matters that Congress specifically reserved to the courts in § 635(a). When Congress intends to preempt state or local government power, it must be "unmistakably clear" in declaring its intention. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal citation omitted).

C. The Telephone Industry's Search for Other Legal Bases for Commission Authority is Unavailing.

Telephone industry commenters also seek to find support for Commission authority to construe and enforce § 621(a)(1) in § 2(a) and § 4(i) of the Communications Act. But their arguments disregard Congress' explicit grant of jurisdiction over § 621(a)(1) to the courts. "Section 4(i) is not a stand-alone basis of authority and cannot be read in isolation . . . . Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions." *Motion Picture Ass'n Of America, Inc. ("MPAA") v. FCC*, 309 F.3d 796, 806-807 (D.C. Cir. 2002).[19] In reaching its holding in *MPAA*, the court rejected as "an entirely untenable position" the FCC's

[19] *See also American Library Ass'n ("ALA") v. FCC*, 406 F.3d 689, 702-703 (D.C. Cir. 2005) (holding that FCC lacked authority to impose broadcast content redistribution rules on equipment manufacturers using ancillary jurisdiction because the equipment at issue was not subject to FCC subject matter jurisdiction over wire and radio communications, noting that the "Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer 'unbounded' jurisdiction on the Commission . . . .") (internal citation omitted).

view that adoption of rules (requiring video description) was permissible merely because Congress did not expressly foreclose the possibility.[20]

Similarly, here, where Congress in §§ 621(a)(1) and § 635(a) has specifically reserved authority to LFAs and, where disputes arise, to the courts, there was no need for Congress to expressly foreclose the prospect of the FCC charting its own course in disregard of that mandate. *See, e.g., Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *cert denied*, 514 U.S. 1032 (1995) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original). Congress struck a careful balance in its enactment of §§ 621(a)(1) and 635(a) that made it abundantly clear -- leaving no gaps to fill -- that jurisdiction over § 621(a)(1) rests with the courts, not the FCC. *Ry. Labor Executives'*, 29 F.3d at 671 ("[*Chevron*] deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' "). In other words, "great caution" is warranted when, as here, the disputed matter of whether the FCC can adopt rules to construe and enforce § 621(a)(1) "rest[s] on no apparent statutory foundation and, thus, appear[s] to be ancillary to nothing." *ALA*, 406 F.3d at 702. The Commission, to adopt rules in the manner it proposes, must locate a source of jurisdiction other than § 4(i) that does not conflict

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[20] *MPAA*, 309 F.3d at 805. Construing *MPAA* in a subsequent proceeding, the FCC determined that *MPAA* held that the FCC lacked authority to adopt video description rules because, *inter alia*, Congress "specifically authorized and ordered the FCC to produce a report on video description – 'nothing more, nothing less.' " *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd. 20885, 20909 n.139 (2003). If the FCC itself acknowledges the limited reach of § 4(i) when specifically authorized to pursue an administrative undertaking (a report) by Congress, surely the same reasoning indicates the inapplicability of 4(i) in the instant *NPRM* proceeding, where Congress, through the inextricable link of §§ 621(a)(1) and 635(a), explicitly allocated authority over § 621(a)(1) disputes to the courts, not the FCC.

with the more explicit provisions of Title VI. Neither the *NPRM* nor the telephone industry commenters have located, or can possibly locate, such a source.

Plainly stated, Congress' decision in § 635(a) to grant authority to courts over § 621(a)(1) disputes cannot be overcome by reliance on § 4(i). Section § 4(i) authorizes only such FCC action as is "not inconsistent with this Act," and any FCC assertion of authority over § 621(a)(1) would be inconsistent with the Act -- specifically § 635(a).

D. Telephone Industry Commenters' First Amendment Arguments Fail.

Verizon's First Amendment argument (at 16) exaggerates the First Amendment implications of franchising decisions by contending that the First Amendment "independently requires strict limits on the discretion afforded to LFAs," when the LFAs are exercising their Congressionally permitted authority under § 621(a)(1). Verizon's argument begs the question of whether a "reasonable refusal" by an LFA would be a facial violation of the First Amendment. Verizon's claim is tantamount to suggesting that § 621(a)(1) itself runs afoul of the First Amendment, a suggestion that the Commission is powerless to accept.

Verizon's First Amendment arguments appear in two places in its comments -- Section I.A on pages 10-21 ("The First Amendment Also Mandates Limited Discretion for LFAs") and Section II.B.3 on pages 47-51 ("The First Amendment Limits the Build-Out that May Be Required"). The first section is a broad attack by Verizon on the local franchising provisions of §§ 611 and 621 of the Act, although couched in terms (Comments at 16) of "the express limits in Section § 621(2)(4) on the factors that LFAs may consider." Verizon begins:

> It is well established that the First Amendment protects cable companies' right to offer video programming services. *Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 288, 494 (1986). Cable operators express speech not only

> through their original programming but also through their editorial decisions over which stations and programs to disseminate. As the Supreme Court has observed, cable providers "communicate messages, on a wide variety of topics and in a wide variety of formats." *Turner I*, 512 U.S. at 636.
>
> The cable franchising system regulated by Section 621(a) presents special risks to these free speech interests. Like many other licensing or permitting schemes, the cable franchise system requires speakers to obtain permission from local authorities *before* engaging in protected speech. This type of control inherently threatens free expression because it conditions speech on the advance blessing of local authorities -- and silences speech until that blessing is received. In addition, by establishing local authorities as gatekeepers, the franchise system places local governments in the position to impose onerous regulatory conditions on cable operators that can deter or even prevent competitive providers from entering the cable market.

Verizon Comments at 17 (emphasis in original).

This is nothing but a facial challenge to the local franchising provisions of the Cable Act, a challenge that is inconsistent with *Turner I*. No one denies that cable providers, including an additional competitive provider, are speakers entitled to First Amendment protection. But this does mean that providers are free from government requirements and restrictions that serve important government purposes not related to the suppression of free expression. Rather, the reasonableness of the kinds of franchise requirements attacked by Verizon must be evaluated as they are applied in specific factual contexts. In the context of both the franchising process and franchising requirements, these factual contexts will, of course, vary from LFA to LFA.

In *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh'g en blanc denied*¸ 105 F.3d 723 (D.C. Cir. 1997), the court rejected a similarly broad First Amendment attack on nine provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") and two provisions of the 1984 Cable Act. In rejecting Time Warner's constitutional challenge to the public, educational, and governmental ("PEG") provision of

Section 611, the court emphasized that the issue of constitutionality must be addressed as applied, not facially:

> To prevail in its facial challenge, Time Warner must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). Except in the case of an overbreadth challenge, which Time Warner does not make here, "a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984); *see id*. at 798 n. 15, 104 S.Ct. at 2125 n. 15. . . .
>
> Time Warner must therefore show that no franchise authority could ever exercise the statute's grant of authority in a constitutional manner. We can, of course, imagine PEG franchise conditions that would raise serious constitutional issues. For example, were a local authority to require as a franchise condition that a cable operator designate three-quarters of its channels for "educational" programming, defined in detail by the city counsel, such a requirement would certainly implicate First Amendment concerns. At the same time, we can just as easily imagine a franchise authority exercising its power without violating the First Amendment. For example, a local franchise authority might seek to ensure public "access to a multiplicity of information sources," *Turner*, 512 U.S. at ___, 114 S.Ct. at 2470, by conditioning its grant of a franchise on the cable operator's willingness to provide access to a single channel for "public" use, defining "public" broadly enough to permit access to everyone on a nondiscriminatory, first-come, first-serve basis. Under *Turner*, such a scheme would be content-neutral, would serve an "important purpose unrelated to the suppression of free expression," *id.*, and would be narrowly tailored to its goal. Time Warner's facial challenge therefore fails.

Time Warner Entertainment, 93 F.3rd at 972-73. *See also Beach Communications, Inc. v. FCC*, 959 F.2d 975, 984 (D.C. Cir. 1992) ("Because localities have discretion to define the § 621(b) duty, and because the justification for that duty will depend on local facts, petitioners' First Amendment challenge is unripe.")

The test for determining whether a particular franchise requirement has the effect of limiting speech is the *O'Brien* test. As Verizon notes (at 19), such requirements must "further[] an important or substantial government interest . . . the governmental interest [must be] unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest," *Turner I*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)).

Verizon's First Amendment arguments related to buildout requirements (at 47-51) are predicated on a claim that build-out requirements "impose burdens that are wholly disproportionate to the benefits they confer." We have discussed the importance of the governmental interests served by reasonable build-out requirements in our opening comments at 32-34 and in these reply comments below at Part II(B). *See also* the discussion of the importance of buildout requirements and anti-redlining requirements contained in the reply comments filed by the Minority Media and Telecommunications Council, *et al.,* particularly with respect to the response to Verizon's First Amendment arguments at (4-5 n.6). Since buildout requirements vary, not only from LFA to LFA, but among different cable operators within an LFA, Verizon has not, and cannot, demonstrate that there is no buildout requirement that serves an important governmental interest, or that the burden of each and every buildout requirement exceeds the benefits it confers.

Furthermore, the FCC does not have the power to find a provision of its governing Act to be unconstitutional.[21] But this is the remedy that Verizon improperly seeks.[22] The proper forum for such drastic relief, however, lies with the courts, not the FCC.

E. The IPTV Services That Telephone Carriers Plan to Provide Are "Cable Services" Subject to Title VI.

Cincinnati Bell argues in its comments that its contemplated launch of an Internet Protocol-based video service ("IPTV") offering to its residential customers is not a "cable service" within the meaning of § 622(6), and that its offering therefore is not subject to the requirement of Section 621 that it obtain a Title VI cable franchise. Cincinnati Bell requests (at 18-19) the FCC "to *expeditiously find* that IPTV service is not subject to regulation under Title VI or state franchising laws" (emphasis added). As Cincinnati Bell itself recognizes, this request clearly exceeds the scope of the inquiry noticed by the *NPRM*.[23]

In order to properly consider this request, and AT&T's similar suggestion that its IPTV offering is not a "cable service" (AT&T Comments at 3), the Commission would have to initiate a new proceeding with proper notification and allow interested parties to file comments to ensure meaningful participation from the public. *See, e.g., PPG Indus. Inc. v. Costle,* 659 F.2d 1239, 1249-51 (D.C. Cir. 1981) (adopted rule may be set aside where the NPRM is published in the Federal Register, but its contents are deemed inadequate to afford a meaningful opportunity to

[21] *See, e.g., Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) ("[The FCC's] reservation as to its authority [in the underlying proceeding] is predicated on the well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.")

[22] *See, e.g.*, Verizon Comments at 20 ("And while [adoption of proposed] regulations that give effect to the limits imposed by Congress cannot eliminate the constitutional infirmities inherent in the franchise process and Cable Act themselves, they nonetheless can alleviate some of the most pernicious aspects of the current franchise process.")

[23] Cincinnati Bell states on pages 4-5 of its Comments that "while the Commission did not seek comment on regulatory classification of video programming provided over an ILEC's existing DSL infrastructure, Cincinnati Bell takes this opportunity to briefly explain why its proposed IPTV service offering over existing DSL facilities is not subject to the franchising requirements of Title VI."

comment on the issues in the rulemaking); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (a footnote in the background section of NPRM was not adequate notice to long-distance carriers affected by rulemaking).

In any event, Cincinnati Bell and AT&T are wrong: Under the current Cable Act definitions, IPTV services are a "cable service," and are therefore fully subject to the Title VI requirements that apply to cable operators. Rather than burdening the record with a lengthy discussion of this issue, we adopt NCTA's analysis submitted to the Commission in 2005 in Docket No. 04-36, the "IP-Enabled Services" proceeding.[24]

In addition to the arguments presented in NCTA's filings in Docket No. 04-36. we point out two additional flaws in Cincinnati Bell's and AT&T's claims that IPTV is not a "cable service."

First, AT&T's argument that its IPTV is an "information service"[25] is both premature and irrelevant. As the Commission well knows, the classification of most IP-enabled services, including IPTV, remains unresolved in the *IP-Enabled Services* proceeding.[26] And even if IPTV were an "information service," that does not mean that it is not also a "cable service." In fact, "cable service" is a subspecies of "information service." The "information service" definition in 47 U.S.C. § 153(20) is derived from the AT&T Consent Decree's "information service" definition.[27] Under that Decree, "[t]he provision of cable television service . . . clearly involves

[24] *See* NCTA *Ex parte* letter and memorandum, WC Docket No. 04-36 (filed July 29, 2005) ("NCTA Filing #1"); NCTA *Ex parte* response to SBC paper, WC Docket No. 04-36 (filed November 1, 2005) ("NCTA Filing #2").
[25] SBC *Ex parte* letter, WC Docket No. 04-36 at 3, 15-25 (filed Sept. 14, 2005).
[26] *Vonage Holdings Corporation*, 19 FCC Rcd. 22404, 22411-18 n.46 (2004).
[27] *See* H. Confer. Rep. No. 458, 104th Cong, 2d Sess. 114-16 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 125-27.

the generation, transformation and conveyance of information and is thus an information service"[28] -- a conclusion with which the FCC has agreed.[29]

Second, AT&T has suggested that LFAs (indeed all state and local governments) have no jurisdiction over IPTV services because they, like the VoIP services at issue in the FCC's *Vonage Order*,[30] are inherently interstate in nature.[31] But the "inherently interstate" analysis of the *Vonage Order* has no application to "cable services" or to Title VI. Many, if not most, "cable services" are interstate in nature. Unlike Titles I and II, however, Title VI does not draw an intrastate/interstate boundary between federal jurisdiction over cable systems and services, on the one hand, and LFAs' jurisdiction over those systems and services, on the other. Title VI instead provides that LFAs have jurisdiction over local cable systems, regardless whether some of the cable services they provide are interstate in nature, as long as the LFA exercises its jurisdiction in a manner consistent with Title VI. And the specific jurisdictional lines drawn in Title VI, of course, control over the generalized intrastate/interstate lines drawn in Title I and II.

F. The *ECI* Decision is Inapplicable to the Issues in the Instant Proceeding.

AT&T (at 35) and Cincinnati Bell (at 5) contend that *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277 (1998) ("*ECI*"), *pet. for review denied sub nom. City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), *cert. denied sub nom. NATOA v. FCC*, 531 U.S. 825 (2000), supports their claim that "the Commission itself has previously issued orders implementing and enforcing

[28] U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment in *U.S. v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (May 27, 1982),
[29] *Telephone Company-Cable Television Cross-Ownership Rules*, Notice of Inquiry, 2 FCC Rcd. 5092, 5096 n.26 (1987).
[30] 19 FCC Rcd. at 22413-414, 22418-419.
[31] SBC *Ex parte* notice, WC Docket No. 04-36 at 1-2, 37 (filed Sept. 14, 2005); AT&T *Ex parte* notice, WC Docket No. 04-36 at 2, 6 (filed Jan. 12, 2006).

other aspects of § 621 and overruling franchising authority decisions that violate § 621." This assertion seriously misconstrues *ECI*.

In *ECI*, the FCC "caution[ed] other MVPDs that the [*ECI*] decision is *expressly limited* to the facts before the Commission as presented by ECI." 13 FCC Rcd. at 14311, *ECI,* ¶ 73 (emphasis added). The FCC noted the following unique facts present in *ECI* that limited the applicability of its holding:

> "[W]e note that: (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers."

Id.

The relationship among Cincinnati Bell and its various subsidiaries (just like the relationship of other ILECs and their video subsidiaries and affiliates) does not, and cannot, meet several of these conditions. We mention only a few of those failings here. In *ECI*, there was absolute separation of ownership between ECI and Ameritech, who were completely unaffiliated with one another. *Id.* This feature is utterly lacking in the case of Cincinnati Bell and its wholly-owned telephone and video subsidiaries. In their corporate arrangement, both Cincinnati Bell Entertainment ("CBE," the video service provider) and Cincinnati Bell Telephone ("CBT," the local exchange carrier whose right-of-way facilities CBE uses), are commonly-owned subsidiaries of Cincinnati Bell. (Cincinnati Bell Comments, at 1 n.1).

ECI also relied on the fact that ECI's facilities were located entirely on private property (*ECI*, 13 FCC Rcd. at 14299 at¶ 47). Once again, this *ECI* factor is not met in the example of Cincinnati Bell. Here, CBE clearly plans to use the "the transmission facilities owned by CBT," its 100% commonly-owned affiliate, which of course "do occupy the *public* rights-of-way." (Cincinnati Bell Comments, at 6) (emphasis added). In other words, both the right-of-way facilities to be used (CET's), and the provision of video programming (by CBE), are wholly and commonly-owned by Cincinnati Bell.[32]

Given the these obvious distinctions, neither AT&T nor Cincinnati Bell can rely on *ECI* for the corporate sleight-of-hand they propose to evade the Cable Act's "cable operator" and "cable system" definitions.

II. EVEN IF THE FCC HAD AUTHORITY TO CONSTRUE OR ENFORCE § 621(a)(1) , THE RULES PROPOSED BY THE TELEPHONE INDUSTRY AND ITS ALLIES ARE CONTRARY TO THE CABLE ACT.

Even if one were to ignore the clear link between § 621(a)(1) and § 635(a) that gives courts, not the FCC, jurisdiction over § 621(a)(1), and thus even if one were to assume that the FCC has authority to adopt rules concerning § 621(a)(1) (which it does not), any such rules would still have to consistent with § 621(a)(1) and, more generally, the Cable Act. The series of

[32] Cincinnati Bell cites (at *id*., n.14) *City of Austin v. Southwestern Bell Video Service, Inc*, 193 F.3d 309 (5th Cir. 1999), for the proposition that where one subsidiary distributes video programming of through the right-of-way facilities of another subsidiary, the initial subsidiary is not a "cable operator" under the Act. We disagree. As an initial matter, *Austin* is distinguishable because the court there only addresses the question of whether or not Southwestern Bell Video Services ("SBVS") was a "cable operator," not the question of whether its parent, SBC Communications, Inc. ("SBC"), was a "cable operator." 193 F.3d at 312 n.9. To the extent that *Austin* could be construed as holding that neither SBVS nor SBC was a "cable operator," then the *Austin* court was clearly mistaken, since the "cable operator" definition in § 602(5) sweeps together commonly owned affiliates in determining whether such a group of entities collectively is a "cable operator":

> "the term 'cable operator' means any person *or group of persons* (A) who provides cable service over a cable system and directly or through *one or more affiliates* owns a significant interest in such cable system," or (B) who *otherwise controls or is responsible for, through any arrangement*, the management and operation of such a cable system;"

47 U.S.C. 522(5)(A) (emphasis added). Unlike *Austin*, the FCC's *ECI* decision, in its discussion regarding separation of ownership, properly acknowledges the inclusion of affiliates in § 602(5)'s "cable operator" definition. And this factor was directly relevant to the Seventh Circuit's decision upholding *ECI*. *See Chicago*, 199 F.3d at 432 (noting that "Ownership and control are relevant factors under the statutes" and "there is no entity [in *ECI*] which owns a significant interest in the system or who controls, manages, or operates the system as a whole.").

preemptive rules proposed by the telephone industry and its allies, however, are in most cases flatly inconsistent with the Cable Act. The Commission can no more adopt these proposed rules than it can substitute itself for Congress and rewrite the Cable Act.

A. Telephone Industry Proposals To Set Time Limits on LFA Franchising Actions Are Contrary to the Cable Act.

Virtually all proponents of § 621(a)(1) rules urge the Commission to set time limits on LFA franchising decisions.[33] The details vary. AT&T, for instance, proposes a 30-day limit,[34] while Verizon proposes a complex, multiple deadline scheme requiring an LFA to negotiate within 30 days, to complete negotiations within 90 days, and an additional 30 days for the LFA to vote on the applicant's submission, for a total of 120 days.[35] BellSouth proposes a deadline of 90 days, beyond which the franchise application will be deemed granted,[36] and Qwest proposes a 6-month deadline with "deemed granted" effect.[37]

The problem with all of these deadline proposals is that they cannot be squared with the Cable Act and would improperly transform the FCC into a national franchising authority. As we pointed out in our opening comments, to use the specific 120-day deadline for franchise transfers found in § 617 to impute a deadline in § 621(a)(1), where no such statutory deadline exists, is to stand the two provisions on their head.[38]

In fact, the initial franchising process is quite different from the franchise transfer process, and contrary to some ILECs' assertions, those differences mean that the initial franchising process will, and should, inherently be longer (or at least more variable) than the

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[33] *See* AT&T Comments at 74-80; Verizon Comments at 35-38; USTA Comments at 41-46; BellSouth Comments at 36; Qwest Comments at 27; NTCA Comments at 9; FTTH Council Comments at 60-63.
[34] AT&T Comments at 79.
[35] Verizon Comments at 38.
[36] BellSouth Comments at 36. NTCA also proposes a 90-day deadline. NTCA Comments at 9.
[37] Qwest Comments at 27.
[38] NATOA et al. Comments at 35-37.

franchise transfer process. In the case of a franchise transfer, there is a franchise agreement already in place, and the only question is whether a new entity will be permitted to assume that franchise. In the initial franchising process, on the other hand, there is *no* existing franchise in place at all. As a result, in the initial franchising process, the issue is not merely whether the applicant is qualified to hold a franchise, but what the terms of the franchise will be.

This leads to another fatal flaw in the telephone industry's franchising deadline proposals. If an LFA must act within a specific time period but fails to do so, what will the remedy be? And if the remedy is that the franchise applicant's application will be "deemed granted," as some in industry propose, what will the terms and conditions of that franchise be? (This, of course, is not a problem with franchise transfers under § 617, because there is an existing franchise in place that the transferee will assume.) It cannot be, as some in industry propose, that the terms of the new entrant's franchise will be the ones that the applicant unilaterally proposes, because that would allow the applicant to dictate unilaterally its own franchise terms, directly contrary to the Cable Act's overarching requirement that cable franchises must be responsive to local needs and interests as determined by the LFA. *See* 47 U.S.C. §§ 521(2), 531, 541(a)(2)-(4), 542, 544(b) & 546. Nor could the FCC dictate the terms of the applicant's new franchise without the FCC effectively becoming the LFA, in direct contravention of the Cable Act, *e.g.*, 47 U.S.C. §§ 522(10), 542(i) & 544(f).[39]

Furthermore, ILEC proposals to set uniform, nationwide deadlines on the franchising process, and to require the awarding of a franchise if the deadline is not met, fly in the face of § 621(a)(1)'s language, which prohibits only "unreasonable" refusals to award an additional

[39] The most logical option, of course not mentioned by the telephone industry, would be for the franchise applicant to assume a franchise with the same terms and conditions as the incumbent. But because the FCC is not an LFA, it cannot dictate *any* terms of a franchise, and thus even this most logical option would be beyond the FCC's power under the Cable Act.

competitive franchise. This inherently means that there must be such a thing as a *reasonable* refusal. But under the ILEC's deadline proposals, there is not: Once the deadline passes, the LFA cannot "refuse" at all, no matter how unreasonable the applicant's proposal in light of community needs, or how unreasonable or recalcitrant the applicant has been in negotiations with the LFA.

Indeed, as noted in our opening comments (at 36-37), any hard and fast deadline would have the perverse effect of encouraging, and rewarding, franchise applicant's recalcitrance in franchise negotiations. And it would also force LFAs to deny applications to preserve their rights.

At bottom, the difficulties with setting any uniform deadline, as well as the problem of determining what the terms of the applicant's new franchise would be, underscore the inherently local and fact-specific nature of the franchising process, a process that is therefore inherently unsuited to uniform, "one-size-fits-all" FCC rules. And it further confirms the wisdom of what § 635(a) says: Courts, not the FCC, are a much better-suited forum for resolving such local, fact-specific matters as § 621(a) disputes.

B. The Cable Act Forbids The Commission from Preempting Franchise Buildout Requirements.

ILECs and their allies uniformly urge the Commission to adopt rules prohibiting LFAs from imposing buildout requirements on competitive franchise applicants, labeling such requirements an anti-competitive "barrier to entry."[40] As an initial matter, we note the telephone industry commenters and their allies appear to misapprehend -- or perhaps intentionally mischaracterize -- the nature of franchise buildout requirements. Franchise buildout

[40] *E.g.*, AT&T Comments at 44-58; Verizon Comments at 39-51; USTA Comments at 21-25; BellSouth Comments at 30-35; Qwest Comments at 8-13; FTTH Council Comments at 32-36.

requirements almost invariably contain density limitations and also provide a reasonable time for system buildout.[41] RBOCs point to nothing but a few anonymous anecdotes suggesting otherwise.[42] Their draconian anti-buildout proposals are thus little more than a self-serving solution in search of a problem.

But telephone industry's anti-buildout proposals are also directly contrary to the Cable Act. Section 621(a)(4)(A) provides:

> In awarding a franchise, the franchising authority -- (A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service *to all households in the franchise area*;

47 U.S.C. § 541(a)(4)(A) (emphasis added).

Try as they might, telephone industry commenters and their allies cannot escape the plain language of this provision. Verizon makes the boldest attempt. First, it argues that § 621(a)(4)(A) speaks to what an LFA must do (allow a reasonable time for buildout), not to what an operator must do (serve all homes in the franchise area). Verizon Comments at 44. The problem with this argument is that it defies the statutory language: One thing that § 621(a)(4)(A) certainly *cannot* be read to mean is that even if an LFA gives a provider a "reasonable period to time" to do so, the LFA can nevertheless be *forbidden* from requiring an operator to "provid[e] cable service to *all* households in the franchise area." Yet that is precisely what Verizon and its allies improperly urge the Commission to do.

Perhaps sensing this obvious flaw in its argument, Verizon then retreats to the argument that a provider "should be permitted to define its own franchise area." Verizon Comments at 46.

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41 NATOA et al. Comments at 32-34; Comments of Maryland Counties at 4, 10-12, 39; Comments of Fairfax County, Virginia at 8 and Attachment II, p.1; Comments of Pennsylvania and Michigan Municipalities at 7-8, 11; Comments of Mt. Hood Cable Regulatory Commission at 21; Comments of Manatee County, Florida at 3, 6, 16.

42 *See, e.g.*, Verizon Comments at Attach. A, McDonnell Decl. at ¶¶ 23-27.

But that is nonsense. If a provider could self-define its franchise area, that would undermine the entire local franchising process envisioned by the Cable Act. Among other things, it would render meaningless not only § 621(a)(4)(A), but also the anti-redlining provision of § 621(a)(3) and the uniform rate provision of § 623(d), since an operator could self-select its service area to avoid every single one of those provisions.

Moreover, Verizon succeeds in disproving its own argument when it relies on early FCC decisions stating that "LFAs should determine 'how best to parcel large urban areas into cable districts,'" and that LFAs are the ones to "decide[] 'the delineation of franchise areas.'"[43] While Verizon is certainly correct that an LFA can define a cable operator's franchise area to be more limited than the LFA's entire jurisdictional area (and many franchise areas are in fact so limited by LFAs), Verizon is wrong in suggesting that operators, rather than LFAs, may define such limited franchise areas. To the contrary, the LFA is responsible for "delineat[ing] franchise areas."

Telephone companies' position that there should be no buildout requirements is also inconsistent with their position that such relief is necessary to spread broadband deployment.[44] They cannot have it both ways. Preempting buildout requirements would be a license for promoting limited, and demographically selective, broadband deployment. It is difficult to see how that is a desirable public policy objective.

In the end, the telephone industry's position about buildout requirements, like most of its other § 621(a)(1) rule proposals, is based on what industry would prefer the Cable Act to be, not

[43] Verizon Comments at 45 (quoting *1972 Cable Television Report and Order*, 36 FCC 2d 143 at ¶¶ 143 & 180 (1972)).
[44] Verizon Comments at 41, 48-49, 53; AT&T Comments at 44-45, 53; BellSouth Comments at 33, 38.

what the Cable Act actually is. The Commission can no more accept industry's buildout preemption proposals than it can rewrite the Cable Act.

C. Telephone Industry Attacks on Franchise Fee, PEG and I-Net Requirements Rest on Faulty Premises and Are Contrary to The Cable Act.

Telephone industry commenters launch a range of misguided and unwarranted attacks on cable franchise fee, PEG access, and I-Net requirements. These attacks fall generally into four categories: (1) cable franchise fee requirements; (2) treatment of in-kind and monetary PEG grants; (3) treatment of I-Nets; and (4) treatment of LFA application fee and cost reimbursement requirements.

All of the various rules that telephone industry commenters propose not only in this area, but many others, suffer from a procedural defect that the Commission must cure before it can even consider taking any action: These detailed proposals are nowhere to be found in the *NPRM*, and thus there has not been adequate notice and opportunity for analysis and comment on them. For that reason, if the Commission were otherwise inclined to consider adopting some of the telephone industry's proposals (and it should not be), it must propose specific rules on those topics in a further rulemaking and provide an opportunity for comment.

1. There is No Need for FCC Rules on Franchise Fees, and Industry's Fee Arguments Are Wrong.

Some RBOCs urge the FCC to adopt a single, nationwide franchise fee formula.[45] Other telephone industry commenters worry that LFAs seek to include revenues from non-cable services in the franchise fee gross revenue base.[46] But these proposals, and their allegations, are misguided in several respects.

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[45] *See, e.g.*, AT&T Comments at 64-70; BellSouth Comments at 41-43.
[46] *See id.*; Verizon Comments at 62-64; FTTH Council Comments at 38-40.

As an initial matter, proponents of franchise fee rules have not shown any widespread LFA abuse, nor any problem that courts are not perfectly capable of handling. Aside from the fact that ILECs' allegations of supposed abuse in this area are anecdotal and almost invariably (and improperly) anonymous and thus unverifiable,[47] the meager number of even these anonymous anecdotes relative to the total number of LFAs nationwide certainly does not suggest any widespread problem in this area, which is the necessary predicate for any FCC action. To the contrary, industry's sparse vignettes point to the conclusion that there are relatively few disputes between LFAs and providers concerning franchise fees and that on the few occasions where disputes do arise, courts are fully capable of resolving them.[48]

A couple of RBOC arguments, however, deserve special mention because they are legally incorrect.

BellSouth (at 42-43) argues that "interactive on-demand services," as defined in Section 602(12), are not a "cable service" and thus should not be included in the franchise fee revenue base. BellSouth is wrong. On its face, "interactive on-demand service" is defined as a service providing "video programming," 47 U.S.C. § 522(12), which is of course included in "cable service" definition, 47 U.S.C. § 522(6)(A) & (B).[49] Furthermore, the video programming component of "interactive on-demand service" is primarily "one-way," 47 U.S.C. § 522(6)(A), because the overwhelming bulk of the service is the downstream delivery of video programming

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[47] *See* Verizon Comments at 62-63 & O'Connell Decl. at ¶ 52. AT&T's and BellSouth's claims in this area appear to be unsupported by any evidence of problems with LFAs at all. *See* AT&T Comments at 64-70; BellSouth Comments at 41-43.

[48] *See ACLU v. FCC*, 823 F. 2d 1554, 1574 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (FCC shares concurrent jurisdiction with courts on franchise fee matters, and FCC should act only where need for nationwide policy is shown).

[49] Moreover, interactive on-demand services are unquestionably made available to all subscribers generally, regardless whether an individual subscriber chooses to subscribe to them, so they would equally clearly be "other programming service" even if they were somehow deemed to go beyond "video programming." *See* 47 U.S.C. §§ 522(6) & 522(14).

content to the subscriber. The subscriber's ability to retrieve, time-shift, change camera angles or otherwise manipulate the video programming provided by an interactive on-demand service, in turn, falls comfortably within the language of "subscriber *interaction*, if any, which is required *for the selection or use* of such video programming or other programming service," 47 U.S.C. § 522(6)(B) (emphasis added).

The conclusion that "interactive on-demand services" are a cable service is further confirmed by the *only* place in the Act where the term is used. The term appears only in one of the exceptions to the "cable system" definition, 47 U.S.C. § 522(7)(C), which provides that a system that otherwise would be considered a "cable system" will not be so considered if it is used "solely to provide interactive on-demand services." Of course, if BellSouth were correct that "interactive on-demand services" are not a "cable service," this exception would be superfluous, because the provision of such services would not make a system a "cable system" in any event. In this respect, the "interactive on-demand services" exception to the "cable system" definition is just like another exception to the cable system definition, 47 U.S.C. § 522(A), which provides that a system that would otherwise be considered a "cable system" will not be so considered if it is used "only to retransmit the television signals of 1 or more television broadcast stations." No one would seriously argue that retransmitted television broadcast signals are not a "cable service" merely because they are included in this exception to the "cable system" definition. To the contrary, the need to create this "cable system" exception is perfectly consistent with the indisputable conclusion that retransmitted broadcast signals are a "cable service." So it is with the "interactive on-demand services" exception to the "cable system" definition: It confirms that "interactive on-demand services" are indeed a "cable service."

Verizon (at 63-64) argues that Section 621(b)(3)(B) prohibits LFAs "from seeking fees based on the provision of telecommunications services." While Verizon is correct that the Cable Act prohibits LFAs from including non-cable services such as telecommunications services in the Title VI cable franchise fee revenue base,[50] Verizon is wrong to the extent that it intends to suggest that § 621(b)(3)(B) or any other provision of the Cable Act preempts a local government from requiring a right-of-way user that is both a cable operator and a telecommunications service or other non-cable service provider to pay non-cable franchise fees or other form of right-of-way compensation for the non-cable services it provides, as long as such non-cable franchise fees are consistent with applicable state law.

The Conference Report to the 1996 Act, in discussing the meaning of the newly added § 621(b)(3), makes this point crystal clear;

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manager its public rights-of-way *and charge fair and reasonable fees*."[51]

In other words, while Verizon's (and other ILEC video service providers') provision of telecommunications service is not subject to the 5% *cable* franchise fee set forth in 47 U.S.C. § 542, they are, with respect to their provision of telecommunications and other non-cable services, subject to *non*-cable right-of-way compensation, as long as it is nondiscriminatory and competitively neutral and consistent with state law.

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[50] Verizon is wrong, however, in suggesting that § 621(b)(3)(B) is the reason this is so. The reason is found in § 622(b), which limits the cable franchise fee revenue base to 5% of "a cable operator's gross revenues derived . . . from the operation of the cable system *to provide cable service*." (Emphasis added.) (The emphasized language, like § 621(b)(3)(B), was added by the Telecommunications Act of 1996.)

[51] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 193 (emphasis added).

2. Contrary to Telephone Industry Commenters' Allegations, In-Kind and Monetary PEG Grants for PEG Capital Facilities and Equipment Over and Above the 5% Franchise Fee Are Clearly Permissible Under the Cable Act.

Some telephone industry commenters complain about PEG financial support obligations, urging the FCC to declare that PEG in-kind and monetary grant obligations over and above the 5% franchise fees are not permissible.[52] But the Commission cannot do that, for any such ruling would be contrary to the Cable Act.

AT&T, for example, asserts (at 65) that any kind of in-kind or monetary support for PEG is a "franchise fee" within the meaning of § 622(g)(1) and 622(g)(2)(B). That is simply not true.

As an initial matter, in-kind facilities or services are not a "tax, fee, or assessment of any kind" within the meaning of § 622(g)(1). The phraseology, "tax, fee, or assessment," plainly refers to monetary payments, not non-monetary in-kind facilities and services, and in case there is any doubt, the legislative history of the 1984 Cable Act removes it, stating that § 622 "defines, as a franchise fee *only monetary payments . . . and does not include . . . any franchise requirements for the provision of services, facilities or equipment*."[53] While AT&T and other telephone industry commenters are correct in claiming that the Cable Act forbids an LFA from requiring a cable operator to provide non-cable-related in-kind facilities and services, the reason that is true is not found in § 622, but in §§ 624(a) and (b), which restrict the services and facilities an LFA can require a cable operator to provide to those that are "related to the establishment or operation of a cable system."

[52] AT&T Comments at 65-68; Verizon Comments at 64-72; USTA Comments at 48; BSPA Comments at 3.

[53] H. Rep. No. 934, 98th Cong., 2d Sess. at 65 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4702 ("*1984 House Report*") (emphasis added).

With respect to monetary payments to support PEG, Section 622(g)(2)(C) specifically exempts from the "franchise fee" definition "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[54] Thus, monetary payments to support PEG are *not* a "franchise fee," and not to be offset against the 5% franchise fee cap, as long as those payments are used only for PEG capital facilities and equipment.[55] Moreover, even with respect to non-capital PEG payments, "any payments which a cable operator makes voluntarily relating to support of [PEG] access and which are not required by the franchise would not be subject to the 5 percent franchise fee cap."[56]

Telephone industry commenters are therefore simply wrong in suggesting that the Commission can, or should, limit PEG support payments over and above the 5% franchise fee cap.

3. Commenters' Attacks on Institutional Networks Must be Rejected.

Telephone industry commenters also attack institutional network, or "I-Net," obligations in franchises.[57] But these attacks rest on fatally flawed legal and factual premises.

I-Net opponents point to *City of Dallas v. FCC*, 165 F.3d 341, 350-51 (5th Cir. 1999), and argue that it means that LFAs cannot require ILEC entrants to provide "non-video communications networks or services that they characterize as . . . 'I-Nets' as a condition of receiving a franchise."[58] But they have misread *Dallas* and the Cable Act.

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[54] PEG capital support that is excluded from the "franchise fee" definition would include monetary grants used for PEG studio equipment and facilities, and institutional networks. *See* §§ 611, 622(g)(2)(C) & 624(b).

[55] While AT&T (at 66. n.83) cites the Cable Services Bureau decision in *City of Bowie, Maryland*, 14 FCC Rcd. 7674 (1999), it inexplicitly overlooks the Bureau's subsequent clarification of that decision which makes this point clear. *See City of Bowie, Maryland*, 14 FCC Rcd. 9596 (1999). For the same reason, Verizon's reliance (at 70) on *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 433628 at *12 (N.D. Ill. filed July 29, 1997), is misplaced.

[56] *1984 House Report* at 65 (quoted in *City of Bowie, Maryland*, 14 FCC Rcd. at 9598).

[57] *E.g.*, Verizon Comments at 72-75; AT&T Comments at 67-70; BellSouth Comments at 39-40.

[58] Verizon Comments at 72.

The Cable Act defines an "institutional network" as "a *communication* network which is constructed or operated by a cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. § 531(f) (emphasis added). Thus, telephone industry arguments that I-Nets are somehow limited to video service fly in the face of the statute, which refers to I-Nets as a "*communications* network" -- which would clearly encompass non-video services, such as data transmission and telecommunications.[59] They also fly in the face of reality: Today, I-Nets provided by cable operators are used by LFAs for a variety of non-video applications, such as data and voice communications, and those I-Nets perform vital public safety and homeland security communications functions.[60] That is a capability that LFAs and, indeed, local residents and our nation, cannot afford to lose in these dangerous times.

Telephone industry commenters are equally mistaken in asserting that *Dallas* or the Cable Act somehow prevents LFAs from requiring access to their "communication networks" for I-Net use as a condition to granting a cable franchise. The issue is *not* whether LFAs can "require cable operators to build [I-Nets]," but rather whether LFAs can "require . . . that . . . channel capacity on [I-Nets] be designated for educational or governmental use." *Dallas*, 165 F.3d at 350 (quoting § 611(b)). Section 611(b) clearly allows LFAs to do that.

Cable operators that are ILECs -- and certainly all RBOCs -- undoubtedly have "existing institutional networks." *Dallas*, 165 F.3d at 350. Indeed, by their own admission, the primary

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[59] Any doubt on this score is removed by § 621(b)(3)(D), which exempts "institutional networks" from its general prohibition on LFAs to require telecommunications service. If RBOC commenters were correct the I-Nets were limited to video services, § 621(b)(3)(D) would be surplusage. *Cf. Dallas*, 165 F.3d at 351 (rejecting a argument that would reduce § 621(b)(3)(D)'s "institutional network" exception to surplusage).

[60] *See* Comments of the Communications Division, Designated Cable Franchise Agency in the City of St. Louis, Missouri at 22-23; Comments of Maryland Counties at 9, 14; Initial Comments of the Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission at 10-12; Comments of the City of Indianapolis at 4, 6; Comments of the Michigan Coalition at 60; Comments of the San Mateo County Telecommunications Authority, San Mateo County, Silicon Valley, California at 4.

driving force behind ILECs' efforts in the *NPRM* is their deployment of broadband networks that provide voice, data and video services.[61] And portions of those networks' capacity are almost undoubtedly (as least in most cases) "available only" to non-residential subscribers within the meaning of § 611(f). Therefore, at least for those new cable franchise applicants that meet this description (and almost all ILECs will), the Cable Act allows an LFA to require the operator to designate capacity on those institutional networks for educational and governmental use, § 611(b).

Telephone industry commenters nevertheless complain that requiring them to designate I-Net capacity would be "unnecessary" and "wasteful" because it would duplicate I-Net capacity already provided by the incumbent cable operator.[62] But there is no reason, or evidence, to suppose that all of an LFA's I-Net needs are met by the incumbent's I-Net, or that new capacity will not be needed to meet growing local governmental or educational needs, either in terms of new locations to be served, additional transmission capacity, or to provide redundancy for security or public safety reasons. Certainly that is not a judgment the FCC is in any position to make on a nationwide basis, because local needs and interests vary, as not only the entirety of the Cable Act recognizes, but also as the Act incorporates as one of its primary goals, *see* 47 U.S.C. § 521(2).

[61] *See, e.g.*, AT&T Comments at 1-2; Verizon Comments at i; Comments of Cincinnati Bell, Inc. at 2; Comments of BellSouth at 4.

[62] *E.g.*, BellSouth Comments at 40.

4. Application Fees, Cost Reimbursement Requirements and Indemnity Provisions Are Requirements or Charges Incidental to the Awarding or Enforcing of a Franchise Within the Meaning of § 622(g)(2)(D).

Some RBOCs urge the Commission to adopt rules prohibiting, or severely limiting, an LFA's ability to assess a franchise application fee, acceptance fee, and LFA application processing cost reimbursement requirements over and above the 5% franchise fee.[63] In support of this claim, they rely on one reversed district court decision,[64] two unreported district court decisions,[65] and a single reported district court opinion.[66]

Once again, there is nothing the *NPRM* that gives the public even the remotest notice that the FCC might possibly adopt rules such as those proposed by the RBOCs on this topic. And in fact, virtually all of the telephone industry's other proposed rules, except perhaps those relating to deadlines for LFA actions on franchise applications and buildout requirements, suffer from this defect. For this reason alone, the Commission cannot adopt industry's proposed rules, at least not without the FCC itself actually proposing such rules and then providing an opportunity for the public to comment on them.

But the RBOCs' attempts to eliminate franchise application fees and cost reimbursement requirements are also contrary to the Cable Act. Section § 622(g)(2)(D) provides the following exception to the Cable Act's "franchise fee" definition:

> (2) the term "franchise fee" does not include –
> . . .

[63] *See* Verizon Comments at 62; AT&T Comments at 67.
[64] *Charter Communications v. County of Santa Cruz*, 133 F.Supp. 2d 1184 (N.D. Cal. 2001), *rev'd*, 304 F.3d 927 (9th Cir. 2002).
[65] *Time Warner Entertainment Co. v. Briggs*, 1993 U.S. Dist. LEXIS 1196, 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Communications v. City of Birmingham*, 1989 U.S. Dist. LEXIS 7475, 1989 WL 253850 (N.D. Ala. 1989).
[66] *Robin Cable Systems v. City of Sierra Vista*, 842 F.Supp. 380 (D. Ariz. 1993).

> (D) requirements or charges *incidental to* the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification penalties, or liquidated damages.

47 U.S.C. § 542(g)(2)(D) (emphasis added).

Verizon and AT&T, like the misguided (and mostly unreported or reversed) district court decisions on which they rely, have simply misread the statutory language. They believe that the word "incidental" in § 622(g)(2)(D) means "incidental" *in amount*.[67] But that is not what § 622(g)(2)(D) says. It instead refers to "requirements or charges *incidental to the awarding or enforcing* of the franchise." When followed by the preposition "to," "incidental" means "likely to happen or naturally appertaining."[68] Obtaining a mortgage, for instance, is typically "incidental to" buying a house, but the mortgage is not necessarily (or even usually) "incidental" in amount.

In contrast, Verizon and AT&T improperly urge the Commission to rewrite § 622(g)(2)(D) either to read "*incidental* requirements or charges *incidental to* the awarding or enforcing . . .," or to read "requirements or charges *incidental in amount and* incidental to the awarding or enforcing . . . ." The Commission is powerless to rewrite the statute in either way.

There is another reason why the term "incidental" in § 622(g)(2)(D) cannot be read to be incidental in amount. The other "charges or requirements" listed as examples in § 622(g)(2)(D) -- "bonds, security bonds, letters of credit, insurance, indemnification, penalties, or liquidated damages" -- cannot plausibly be construed to be invariably incidental in amount. In fact, some, such as insurance or indemnification, which could come into play if a cable operator's error resulted in a sizable casualty accident in the right-of-way or elsewhere, must and

[67] *E.g.*, Verizon Comments at 60 (quoting *Robin Systems*, 842 F.Supp. at 381).

[68] *Random House Dictionary of the English Language*, at 720 (Unabridged Ed. 1967). "Incidental" means small in amount, in contrast, when it is used as a modifying adjective preceding a noun. *See id.*

should be quite large. The point is twofold: (1) it simply is not plausible to read the list of "requirements and charges" in § 622(g)(2)(D) as inherently small in amount, and (2) circumstances will vary from community to community, depending on such factors as the size of the community and the nature of a cable operator's franchise violation or casualty-causing behavior, among others.

Thus, while it may be true that an application fee or cost reimbursement requirements must be reasonable in amount, there is no one-size-fits-all amount -- and certainly not the $5,000 amount proposed by AT&T (at 66) -- that is amenable to adoption in any FCC rule. The amount of such application fees and cost reimbursement depends on a variety of factors, not the least of which is how cooperative, or recalcitrant, the applicant is in the franchise application and negotiation process.[69]

AT&T's related proposal (at 66) -- that the costs an applicant incurs in connection with an obligation to indemnify the LFA against lawsuits arising out of the granting of the franchise to the applicant are a "franchise fee" -- is absurd. First of all, "indemnification" is explicitly excluded from the "franchise fee" definition by § 622(g)(2)(D). Second, indemnification provisions of the type described by AT&T are common in virtually all municipal franchises, both cable and non-cable alike. The reason: A municipality's granting of a franchise to a private concern to use the rights-of-way for private profit-making is an action whose primary beneficiary is the franchisee, not the municipality whose rights-of-way the franchisee will be using. Therefore, the franchisee (and its shareholders and customers) should bear the financial risk of that benefit, not the municipality's general taxpayers.

[69] *See, e.g.*, NATOA *et al.* Comments at 28-30; TCCFUI Comments at 10-18.

D. RBOC Arguments That Their Mixed Use Systems Are Not "Cable Systems" Are Contrary to The Cable Act.

The RBOCs argue, in various ways, that the entirety of their upgraded broadband systems -- which are unquestionably built to offer cable services, among other services -- are not "cable systems" within the meaning of § 602(7).[70] In one important sense, these arguments are a straw man: The issue is not whether an RBOC's mixed-use broadband system is a cable system "in its entirety." Nor is it a question of whether a RBOC's broadband system is a cable system in part if it is used to provide cable service. The RBOCs do not -- and cannot -- dispute that their broadband systems are a cable system in part if used to offer a cable service.[71]

Rather, the real question is what is a "cable system" under § 602(7)(C) when the same physical plant is intended to be used to deliver both cable and telecommunications services.[72] And the Cable Act answers that question: A "cable system" is "a facility, consisting of [among other things] a set of closed transmission paths," and "a facility of a common carrier" is also a "cable system" "*to the extent such facility is used* in the transmission of video programming

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[70] Verizon Comments at 80-88; AT&T Comments at 71-72; BellSouth Comments at 45-47.

[71] Verizon Comments at 83 (quoting § 602(7)(C)); BellSouth Comments at 46 (appearing to concede that its upgraded system is a cable system in part once "cable service is actually offered over that network"). AT&T (at 71) appears the only possible exception, but that is based on its view that its IPTV service is not a "cable service" and thus it is not a "cable operator" – a view that is patently incorrect, *see* Part I(E) s*upra*.

[72] The RBOCs repeatedly refer to upgrades of their "existing telephone networks" or to themselves as existing "telecommunications carriers" authorized to use the right-of-way, as well as pointing to the alleged relevance of § 253, which preempts state or local requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service." Verizon Comments at 84; AT&T Comments at 71; BellSouth Comments at 46 & n.78. As an initial matter, the franchise requirements of Title VI cannot plausibly be construed to be a "barrier to entry" under § 253. Moreover, while it is certainly true that the RBOCs are telecommunications service providers authorized by state and local law to use the rights-of-way to provide telecommunications services, they are playing a shell game with service definitions: As the FCC is well aware, to escape the regulatory obligations of telecommunications carriers the RBOCs have elsewhere vigorously argued to the FCC that virtually all of the new services they intend to provide over their new broadband networks are "information services" rather than "telecommunications services." *See, e.g.,* Memorandum of Points and Authorities in Support of Verizon's Petition for Declaratory Ruling or Interim Waiver and Conditional Petition for Forbearance with Respect to Broadband Services Provided Via Fiber to Premises, WC Docket No. 04-242 (filed June 28, 2004) at 3-4. Here, in contrast, they seek to hide behind § 253, which of course only deals with "telecommunications services." The Commission should not allow the RBOCs to have it both ways.

directly to subscribers . . . ." § 607(7)(C) (emphasis added). This means that, to the extent that a common carrier facility is used to provide cable services, it is *both* a cable system *and* a common carrier facility, and that the "cable system" component of the mixed-use facility includes the facility's "set of closed transmission paths" -- *i.e.*, its physical wires and cable (among other things). And the legislative history removes any doubt on this point:

> The term 'cable system' is *not* limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. *A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.*[73]

Thus, there can be no question that, to the extent that the RBOCs' upgraded networks are "designed to include the provision of cable services . . . along with [non-cable services]" (and the RBOCs' upgraded networks unquestionably are), those networks *are* a "cable system."[74]

But this legal conclusion does not, and need not, result in the supposed problems or "barriers" about which the RBOCs complain. Although the RBOCs assert otherwise, there is simply *no credible evidence at all* in the record that LFAs are in any way hampering RBOC network upgrades by demanding a cable franchise before any network upgrade activity can commence.[75]

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73 *1984 House Report* at 44 (emphasis added).

74 It is therefore undeniably true that, although Verizon wishes it were otherwise, "once Verizon begins to offer video over its FTTP network," all of the wires and other facilities Verizon uses to provide that service are a "cable system," regardless whether those wires and facilities are also used to provide non-cable service. Verizon Comments at 80 & O'Connell Decl. at ¶ 49.

75 The best Verizon can come up with to the contrary is one un-named Virginia "town," and two communities in New York where Verizon's position prevailed before the New York Public Service Commission. Verizon Comments at 80-81 & n.49. The best BellSouth can come up with is a FCC proceeding resolved six years ago, and a pending lawsuit by AT&T against the City of Walnut Creek in California. BellSouth Comments at 46 & nn.76-78. And AT&T comes up with no examples at all. This is hardly a basis for any Commission action. Indeed, given the paltry nature of the RBOCs' evidence relative to the number of LFA commenters where RBOC network upgrades are occurring, the record is powerful evidence *against* the need for any FCC action.

As is the case with so many of the RBOCs' other proposed FCC rules, RBOC "cable system" definition complaints are therefore a draconian solution in search of a non-existent problem. But the RBOCs' proposals in this regard are more pernicious than that. They are blatantly improper attempts to deceive the Commission into taking positions clearly contrary to the Cable Act. For example, BellSouth complains about the City of Walnut Creek's conditioning the issuance of a ROW permit to AT&T on AT&T's agreement that it will not provide video service without first obtaining a franchise.[76] Yet what could possibly be objectionable about Walnut Creek's position? That city is *not* conditioning the ROW permits for AT&T's system upgrade on AT&T first obtaining a cable franchise, but only on AT&T's agreement to do precisely what the Cable Act requires: to obtain a cable franchise before providing video service. *See* §§ 607(7)(C) and 621(b)(1). *See also* Cal. Govt. Code § 53066. How requiring AT&T to abide by law as a condition for receiving a ROW permit is any sort of "barrier" at all, much less an unlawful one, no RBOC can explain.

Similarly misleading is Verizon's assertion (at 83) that "[t]he purpose of franchise requirements is to preserve local control over the use of public rights-of-way" and since, according to Verizon, it already has the right to use the ROW for telephone service, the "purpose" of a cable franchise is mooted. While ROW management and control is unquestionably *one* of the purposes of local cable franchising, it is not the *only* purpose of cable franchising. Rather, the purpose of cable franchising is to assure that a cable system is responsive to *local* community needs and interests, and those needs and interests extend well

[76] BellSouth Comments at 46 n.78 (citing *Pacific Bell v. City of Walnut Creek*, No. C-05-4723 MC (N.D. Cal. filed Nov. 17, 2005)).

beyond ROW use and management to such matters as PEG requirements, I-Nets, customer service standards, and buildout requirements.[77]

Likewise mistaken is Verizon's wholly unsupported suggestion (at 83) that its network upgrades to provide cable and other services "do[] not change the character or extent of its use of the rights-of-way." In fact, RBOC system upgrades of their existing telephone networks to provide video and other broadband services do in fact often entail considerable new construction work in the ROW and the installation of sizable new cabinets and other facilities in the ROW.[78]

What RBOCs are really seeking from the FCC is a license to run roughshod over virtually all local ROW requirements and to end-run the cable franchise process even after they offer video services over their upgraded networks. But that the Commission cannot, and should not, do.

E. AT&T's Proposal That the FCC Preempt "City-Specific" Customer Service Standards Is Contrary to The Cable Act and FCC Rules.

AT&T (at 72-73) urges the FCC to adopt rules preventing LFAs from adopting "city-specific" customer service standards, and data collection requirements by which compliance with such standards is measured and enforced. According to AT&T, such standards should be preempted because it is more inconvenient and costly for AT&T to have to comply with such city-specific requirements.

As an initial matter, AT&T does not explain why it (and presumably other telephone company cable franchisees) is unable to satisfy such requirements when incumbent cable

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[77] *See* NATOA *et al*. Comments at 26-30; Comments of the Michigan Coalition at 5-8; Comments of the Maryland Counties at 31-35; Comments of the San Mateo County Telecommunications Authority, San Mateo County, Silicon Valley, California at 10.

[78] *See, e.g.*, Stephanie McCrummen, "Fiber-Optic Cable Work Has Officials on Watch for Problems," *Washington Post* (June 9, 2005) at VA-03; Marshall and Brewer, "San Ramon Welcoming AT&T Plan Livermore, Walnut Creek Aren't," *Contra Costa Times* (Feb. 15, 2006), available at http://www.mercurynews.com/mld/mercurynews/news/breaking_news/13881671.htm

operators (who have been consolidating and centralizing their customer service operations for years) have nevertheless somehow managed to do so. But the short answer to AT&T's proposal is that the Cable Act and FCC rules specifically allow LFAs to do what AT&T urges the Commission to preempt. The Cable Act allows an LFA, by "municipal law or regulation," to establish and enforce "customer service requirements that exceed the standards set by the Commission . . . or that address[] matters not addressed by the standards set by the Commission." 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4). AT&T's attempt (at 73) to sidestep these clear provisions by pointing to the language in § 632(d)(2) referring to the alternative possibility of a cable operator's voluntarily agreeing to customer service standards exceeding the Commission's standards is unavailing. Both § 632(d)(2) and the FCC's rules clearly provide a municipality with the alternative of imposing such standards unilaterally by municipal "law or regulation," and the FCC has also recognized the additional alternative of imposing such standards through "the franchising process"[79] -- the very process from which AT&T improperly seeks relief.

Once again, AT&T's real complaint is with the Cable Act, not LFA actions. And the Commission cannot rewrite the Cable Act to suit AT&T's business preferences.

F. AT&T's Request To Preempt LFA "Demands" For Space in Local Headend Facilities Is Wholly Unsupported and Contrary to Law.

AT&T (at 70) makes the peculiar and baseless claim that the FCC should preempt supposed LFA "demands" that new entrants utilizing AT&T's system architecture provide "space" in its "headend buildings" for PEG "studios, equipment and personnel." This claim is peculiar, and grossly unwarranted, in two respects.

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[79] *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2892, 2895-96 (¶ 12) (1993) (quoted in AT&T Comments at 73).

First, AT&T cites absolutely *no* examples where an LFA has ever made such a "demand." It is therefore difficult to understand what AT&T is complaining about.

Second, AT&T also mischaracterizes the nature of the so-called headend "space" requirements in incumbent operator's franchises to which it refers. To be sure, some franchises require an incumbent cable operator to provide a PEG studio or studios. Those studios may or may not happen to be located near the operator's headend, but a franchise agreement seldom, if ever, requires that it be so located. And although AT&T's system architecture may differ somewhat from that of traditional incumbent cable operators, it is wrong in suggesting (at 70) that incumbent operators' hybrid fiber/coax systems do not have neighborhood nodes, or that those systems do not have a single headend serving multiple LFA areas.

AT&T does not (AT&T Comments at 70), and cannot (*see* §§ 611, § 621(a)(4)(B) & 622(g)(2)(C)), claim that it is immune from being required to provide adequate PEG equipment and facilities, including studios, nor that it is immune from being required to pick up PEG signals at PEG origination points and deliver them to subscribers over its system. So regardless where such PEG studios and other facilities and equipment may be located in relation to AT&T's headend or other network facilities, and regardless how AT&T's interconnection with PEG origination locations is accomplished, an LFA can require AT&T to provide these facilities and services. The reason PEG studios and interconnection are sometimes located near a cable system headend is, ironically enough, to reduce the cable operator's investment costs. It is difficult to understand why AT&T would ask the FCC for a rule that would prohibit these requirements from being accomplished in one particular way, even if that way might happen to be the most cost-efficient way in a particular market.

G. Telephone Industry Attacks on "Level Playing Field" Requirements Are Unwarranted.

Telephone industry commenters and their allies virtually unanimously urge the Commission to preempt so-called "level playing field" requirements.[80] Many such requirements are state laws, but similar provisions are also sometimes included in incumbent cable franchise agreements or LFA ordinances.

It is true that state "level playing field" laws can sometimes complicate an LFA's task of awarding competitive cable franchises. Such state laws typically require an LFA to walk the line between not "unreasonably refusing to award an additional competitive franchise" within the meaning of § 621(a)(1) while, at the same time, not granting a competitive franchise that is "more favorable or less burdensome" than the incumbent's franchise.

But industry's blanket attacks on "level playing field" requirements are misguided in several respects. First, because only courts, not the FCC, can construe and enforce § 621(a)(1)'s "unreasonable refusal" requirement,[81] § 621(a)(1) furnishes the Commission with no authority to preempt state level playing field laws, just as it furnishes the Commission no such authority with respect to individual LFA franchising decisions.

Second, there is little or no evidence to suggest that state level playing field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges. The evidence in the record about how many competitive franchises LFAs have in fact granted certainly belies this allegation.[82] Moreover, those courts that have construed state level playing field laws have interpreted them as not requiring identical treatment

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[80] Verizon Comments at 76-80; AT&T Comments at 41-42; BellSouth Comments at 43-45, USTA Comments at 41, 51-57; FTTH Council Comments at 63-64.

[81] *See* Part 1 *supra* and NATOA *et al.* Comments at 4-21.

[82] *See* NTCA Comments at 9-10; Comcast Comments at 5-6; Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators at 2, 6 and Exhibits A - C.

of the incumbent and the newcomer, or a provision-by-provision comparison of the incumbent's and the newcomer's franchises, but instead requiring only an assessment of whether the newcomer's franchise, taken as a whole, is more favorable or less burdensome than the incumbent's.[83]

Third, to the extent that opponents of level playing field requirements mean to suggest that the FCC can or should untether the terms of competitive franchises from those of the incumbent's cable franchise, or that competitive franchises should not have to be comparable to the incumbent's franchise, they are simply wrong. As we noted in our opening comments,[84] and several other parties agreed,[85] the competitor's franchise should be comparable to the incumbent's in terms of meeting local cable-related needs and interests such as PEG capacity and support, I-Nets and similar requirements.[86] The reason is obvious: The touchstone of the Cable Act is that a cable system must be responsive to *local* community cable-related needs and interests, *not* cookie-cutter, federally-determined needs and interests.[87] The incumbent's franchise is by definition the most recent embodiment of an LFA's determination of its local cable-related needs and interests. While that certainly does not mean that a competitive

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[83] *See, e.g., New England Cable Television Assn. v. Dept. of Public Utility Control*, 247 Conn. 95, 717 A.2d 1276 (1998); *United Cable Television Services Corp. v. Dept. of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995); *Knology, Inc. v. Insight Communications Co.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001).

[84] NATOA *et al.* Comments at 29-30 & 34-35.

[85] *See* NCTA Comments at 12-19; Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators at 17-18; Comments of the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, Howard County, Maryland, the Cities of Bellevue and Olympia, Washington and the Washington Association of Telecommunications Officers and Advisors at 13, 15.

[86] NATOA *et al.* Comments at 29-38. *See id* at n.33 for what we mean by "comparable."

[87] NATOA *et al.* Comments at 3, 12-13 & 35; NCTA Comments at 12-19; Comments of the Michigan Coalition at 45-46; Initial Comments of the Public Cable Television Authority, City of Canyon Lake, California, City of Chino, California, City of Duarte, California, City of Encinitas, California, City of Glendale, California, City of Hawthorne, California, City of Irvine, California, City of Laguna Beach, California, City of Laguna Niguel, California, City of La Palma, California, City of La Quinta, California, City of Moreno Valley, California, City of San Clemente, California, City of Santa Cruz, California, City of Torrance, California, City of Twentynine Palms, California, County of Santa Cruz, California, and County of San Diego, California at 10-11; Comments of Pennsylvania and Michigan Municipalities at 3-4, 22.

franchise must or should be identical to the incumbent's (in fact, competitive franchises are rarely, if ever, identical to the incumbent's), it does mean that the competitive franchise should be comparable to the incumbent's in terms of its responsiveness to local cable-related needs and interests, taking into account, of course, differences in the facts and circumstances that may apply to the incumbent and the newcomer.[88] And because local cable-related needs and interests, as well as the facts and circumstances surrounding each competitive franchise application, will inevitably vary from LFA to LFA, these are matters that are inherently not amenable to any "one-size-fits-all" Commission rule or policy.

That brings us to the final point. Congress gave § 621(a)(1) disputes to the courts rather than the FCC for a very good reason: Such disputes are inherently fact-specific, and thus are ones that the courts are particularly well-suited to handle, and that the FCC is particularly ill-equipped to handle. They are also disputes that, if left in the hands of the FCC rather than the courts, would threaten the local community needs-based form of franchising that the Cable Act endorsed and preserved.

We submit that this is a balance that has worked very well, and that the record here, stripped of the telephone industry and its allies' rhetoric and anonymous anecdotes, amply supports. While industry clearly disagrees with the Cable Act's (and our) preferences in this regard, the proper forum for any relief is not the Commission, but Congress. The Commission should use the occasion of the *NPRM* to instruct the telephone industry firmly that regardless of

[88] Telephone industry commenters' claim that § 621(a)(1) somehow empowers the FCC to relieve them of any comparability obligations with incumbent franchises is also belied by the FCC's own open video system ("OVS") rules, which explicitly require an OVS operator to abide by PEG and related obligations that are measured by the PEG and related obligations of the incumbent cable operator, and thus will vary from LFA to LFA. *See* 47 U.S.C. § 76.1505. This comparability requirement is also embodied in the Act itself. *See* 47 U.S.C. § 573.

how the Commission my feel about the merit of industry's policy arguments, the Commission is not the proper forum to resolve them.

CONCLUSION

For the foregoing reasons and those set forth in our opening comments, the Commission should decline to adopt any rules or guidelines to implement or enforce § 621(a)(1)

Respectfully submitted,

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